IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
APPEAL FROM ORDER NO.330 OF 2005

Sanjay Baburao Kadage Appellant

Vs.

Smt.Sulochana Adappa Kadage & ors. Respondents

Mr.G.S.Godbole for appellant.
Mr.Tejas Ingale for respondent nos.1 to 3.

CORAM: B.H.MARLAPALLE,J.
June 28, 2005.

ORAL ORDER:

1. Heard Mr.Godbole, the learned counsel for the appellant-original defendant and Mr.Tejas Ingale, the learned counsel for respondent nos.1 to 3 - original plaintiffs. This appeal arises from the order passed by the lower Appellate Court on 7-12-2004 allowing Regular Civil Appeal No.396 of 2001 and setting aside the judgment and decree passed by the trial Court in Regular Civil Suit No. 232 of 1996 31-7-2001. The lower Appellate Court has remanded the suit for re-trial and more particularly for adducing evidence on the issue of partition deed relied upon by the plaintiffs.

2. Nana Kadage held agricultural land in village

Jaysingpur, Tal.Shirol of Kolhapur district and he had two sons - Babu and Adappa. Nana died in 1970 and the joint family continued with Babu as the Karta of the family, obviously because he was the elder brother. The younger brother Adappa died on 27-11-1985. Plaintiff no.1 is the wife of Adappa and plaintiff nos.2 and 3 are her two sons. She approached the trial Court with a case that on or about 13-8-1976 there was a partition between the two brothers i.e. Babu and Adappa Kadage and as a result of the said partition the suit land located in Gat No.47, Hissa No.4/2 admeasuring 1 H. 30 Rs. was equally divided and half share i.e. 1 H. 30 Rs. had come to the share of Adappa @ Adinath. She was in possession of the land and she was cultivating the same but on or about 17-9-1996 defendant no.1, who is the son of Babu Kadage, disturbed her possession and threatened. She, therefore, prayed for permanent injunction against the defendants.

. Before the trial Court she had brought on record the partition deed along with list at Exhibit 45. She also claimed that the Revenue authorities had tried to delete her name from the suit property and her appeal before the Collector came to be

allowed as a result of which the revenue record was corrected. 7/12 extract pursuant to the said correction was also brought on record at Exh.45.

3. The case of the defendants was that the suit land was not an ancestral property and it was self - acquired land of Babu Kadage. It was further submitted that on or about 4-2-1976 the father of the defendant no.1 had paid consideration to the Government and subsequently on or about 3-3-1982 the ownership of the land was transferred in his name i.e. in the name of Babu Kadage. The defendant no.1 also relied upon the 7/12 extracts for the years 1970-71 to 1980-81 in support of his case that all along the suit land was owned and possessed and cultivated by Babu Kadage. The defendant no.1, therefore, made out a case before the trial court that the suit was based on no title and the plaintiffs were not entitled for any injunction. The trial Court referred to the 7/12 extracts from the years 1970-71 to 1990-91 and accepted the contentions of the defendant no.1 that the suit land was not a joint family property at any time, there was no partition as alleged on or about 13-8-1976 and in fact on the demise of Nana both the sons had

separated in 1970. The reasoning of the trial court reads thus:

> "... So under all these circumstances, it is very suspicious that the suit property was allotted to her deceased husband Adappa in the year 1976. On the contrary defendant no.1 has very strongly submitted that the suit land was government land till 1982 and this fact is not disputed, hence it cannot be said that it is the ancestral property of plaintiff and defendant no.1. Not only this, the plaintiff also admitted that, "It is true that till the death of Nana Kadage there was a joint family of me and Baburao Kadage, it is true that immediately after the death of Nana, Babu and Adappa were separated". Admittedly Nana Kadage died in the year 1970. From this admission of the plaintiff, it is sufficient to hold that partition actually took place in the year 1970 i.e. after the death of Nana Kadage and it loses the character of joint family."

. The trial Court in para 14 of its judgment dismissing the suit noted that the plaintiff could not prove the partition deed placed on record and, therefore, it could not be relied upon. For these reasons the trial Court held that the suit property was not in possession of the plaintiffs nor was it owned by the plaintiffs. The plaintiffs could not prove that the suit property was allotted to Adappa in partition and, therefore, the plaintiffs were not entitled for injunction as prayed. The suit was dismissed.

4. In appeal the lower appellate Court noted that mere entries in 7/12 extract would not be the sole proof regarding ownership of the suit land more so when it was a joint family of late Nana Kadage and 7/12 extracts right from 1949-50 to 1957-58 as well as 1967-68 indicated that it was a Government land but was under cultivation of Nana Kadage. Babu Kadage being the eldest was managing the affairs of the family and the plaintiff had placed on record a partition deed dated 13-8-1976. If consideration was paid on 4-2-1976 as contended by defendant no.1, as per the plaintiff the family was joint at that time and the consideration was thus paid from the joint family but the name of Babu Kadage continued on the revenue records and the entries were changed only after she took steps and her appeal was allowed by the Collector. The lower appellate Court, therefore, rightly noted that the main document was the partition deed dated 13-8-1976 which was relied upon by the plaintiff and there was no document brought on record by the defendant no.1 to show that the partition had actually taken place in 1970. The plaintiff being an illiterate lady, though represented through an advocate, could not have

sufficient opportunity to lead evidence and prove the said document which went to the root of the dispute between the same family branches. The lower appellate Court, therefore, thought it appropriate to remand the suit for fresh trial so as to give an opportunity to the plaintiff to prove the partition deed she had relied on. The reasoning of the trial Court cannot be faulted with.

5. Mr.Godbole, the learned counsel for the defendant submitted that if the evidence on record supported the case of the plaintiff the lower appellate Court could have granted decree of permanent injunction but there was no case to remand the suit for fresh trial by invoking the powers under Order XLI Rule 23-A of C.P.C. As per Mr.Godbole the lower appellate Court failed to apply its mind to the evidence already brought on record in the form of the depositions of plaintiff no.1 (Exh.47), Shri Mahadeo Dattatraya Hirukade (PW 2, exh.68) and advocate Manisha Dixit (PW 3, Exh.75), Sanjay Kadage - DW 1, Rajkumar Anna Chougule - DW 2 and Akaram Dnyanu Londhe - DW 3. Mr.Godbole relied on the following decisions:

. (i) Ashwinkumar K. Patel v. Upendra J. Patel reported in **(1999) 3 SCC 161** and (ii) P. Purushottam Reddy v. Pratap Steels Ltd. reported in **(2002) 2 SCC 686**.

. In the case of Purushottam Reddy (Supra) the following caveat was reiterated while invoking the powers of remand:

> "...It is only in exceptional cases where the court may now exercise the power of remand dehors Rules 23 and 23-A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 of CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

6. In the instant case having regards to the reasoning given by the trial court and that by the appellate Court in reversing the view taken by the trial Court on the main document viz. the partition deed dated 13-8-1976, it cannot be said that the lower appellate court acted illegally or remanded the

case where it was not warranted. The reasoning given by the lower appellate court in support of its order is justified both on the point of facts as well as law. This appeal is virtually a second appeal and, therefore, unless it involves any substantial question of law, there is no reason to entertain this appeal. Hence this appeal must fail at the threshold.

7. The appeal is dismissed in limine. The interim order, if any, stands vacated. The suit on remand shall be heard and decided by 31-12-2005.
Writ to go forthwith.

8. Mr.Godbole, the learned counsel for the appellant made an oral application for continuing the stay for a period of two weeks. The oral application is hereby rejected.

(B.H.MARLAPALLE,J.)